

* **IN THE HIGH COURT OF DELHI AT NEW DELHI** Signature Not Verified

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+ RFA 901/2003

PRABHA MUNDHRA & ANR Appellant
Through: Mr. S.D. Singh with Mr. Rahul Kumar, Adv
versus

KULDEEP RAI (DECED) THR LRS & ORS Respondent
Through: Mr. Sheikh Israr Ahmed, Adv.

CORAM:
HON'BLE MR. JUSTICE T.S. THAKUR
HON'BLE MR. JUSTICE S.L. BHAYANA

% **ORDER**
07.11.2006

Per T.S. Thakur, J (ORAL)

CM No.11193/2006

The appellants have moved this application pointing out that Sh. Mahesh Rai, respondent No.1-A has expired. The application further points out that the said respondent who was brought on record as a Legal Representative of the deceased/defendant Sh. Kuldeep Rai had remained ex parte before the trial court and that substitution of his LRs could be dispensed with in terms of order 22 Rule 4 (4) and Rule 4(A) of the Code of Civil Procedure. We see no reason to decline that prayer having regard to the averments made in the application.

We accordingly dispense with substitution of the LRs of the deceased Sh. Mahesh Rai in the present appeal. We leave open the question whether any substitution would be required to be made in the suit if remanded back to the trial court for hearing and fresh disposal in accordance with law.

CM No.11193/06 is disposed of.

RFA 901/2003

This appeal arises out of a judgment and decree passed by the court of Additional District Judge, Delhi whereby a suit for declaration and for permanent injunction filed by the plaintiff appellant has been dismissed by the said court.

It is, in our view, unnecessary proposed to set out in detail the factual backdrop in which the suit came to be instituted, the precise case which the plaintiff had set up in the plaint or the defence to the suit set up by the contesting defendant no.3/respondent before us. Suffice it to say that the trial court framed as many as five issues on the basis of the pleadings of the parties on 21.09.2002 and directed the plaintiff to commence his evidence on 16.10.2002. No list of witnesses was, however, filed by the plaintiff nor any affidavits of the witnesses produced till 24.2.2004 when the trial court passed an interim order closing his evidence. The said order was in the following words:-

" S.No.119/2001

24.2.2003 Present: Proxy Counsel present for the plaintiff along with Sh.B.Darshan
Proxy counsel for the plaintiff.
Counsel Sh.I.A.Alvi along with
Attorney Sh.S.S.Tomar.

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Proxy counsel stated that no witness is present today and no witness has been summoned for today. He seeks adjournment to P.E.

I have perused the previous order sheets. The plaintiff has been granted number of opportunities and in my considered opinion, the plaintiff is not entitled to any indulgence from this Court.

I, therefore, close the evidence of the plaintiff.

Counsel for defendant has also made a statement and he stated that he does not want to lead evidence as the evidence of the plaintiff has been closed.

No arguments advanced. Put up for orders at 4. p.m."

The plaintiffs-appellants' case before us is that on 24.2.2003, plaintiff No.2 and his witness Sh.Vishnu Kumar Vyas were present in the court for being examined in support of the suit. The plaintiffs' further case is that when his counsel went to the court with the witnesses, he was given to understand by the court master that the court proceedings will start around 11.a.m. Since the sister of Mr.S.D.Singh counsel for the plaintiff was indisposed, he told the witnesses that they could go away as his return may take some time. By the time Mr.Singh returned to the Court, he was informed that the evidence of the plaintiffs had already

been closed. According to the plaintiff, an application was immediately filed before the court below on the same day setting out the circumstances in which plaintiff No.2 and Mr.Vishnu Vyas were sent away from the court and stating that the said two witnesses were again present for being examined. The application made a prayer for recall of the order closing evidence of the plaintiffs and examining the witnesses who were present for that purpose. 22

The application was entertained by the court and posted to 25.02.2003. In the meantime, the court took up the matter for hearing and pronounced an order dismissing the suit on 24.02.2003 itself. On 25.02.2003 when the plaintiff's application came up for orders, the same was dismissed as infructuous. A review petition filed by the plaintiff also was dismissed by the court below by order dated 18.08.2003. The present appeal assails the impugned judgment and decree dated 24.2.2003 on the ground that the plaintiffs did not have a fair chance to prove their case.

We have heard learned counsel for the parties at some length and perused the record .

The trial court, it appears, has taken a very harsh view of the matter in closing evidence of the plaintiff even when Plaintiff No.2 and one of his witness were present for examination on 24.02.2003. Even assuming that

the past failure of the plaintiff to adduce evidence on the dates fixed for that purpose was without any justification, on 24th February, 2003 when the plaintiff moved an application stating that he was present for getting his deposition recorded, the court below ought to have recalled the order closing the evidence and recorded the testimonies of both the witnesses. Instead of doing so, the court simply posted the application for orders on 25.02.2003 while the suit was taken up on 24.02.2003 itself and dismissed vide the impugned judgment and decree. We fail to appreciate as to how the court could possibly adopt this procedure. The court was aware of the fact that it had entertained an application for recall of the order closing evidence of the plaintiff. It should have adjourned the suit to be taken up only after orders on the application were passed, for otherwise, the application was bound to become infructuous as it indeed became on 25.02.2003.

Learned counsel for the respondent argued that the plaintiff and his witness were not actually present on 24.02.2003. He urged that absence of any affidavit from Vishnu Kumar Vyas or the proxy counsel in support of the version that the plaintiff and his witness was present for getting his statement recorded sufficiently proved that the said version was false. We are not inclined to go that far. We say so because if the court below had any doubt about the assertion made in the application

seeking recall of the order closing the evidence of the plaintiff, it could have verified the presence of the plaintiff and his witness on 24.02.2003 itself. It could direct counsel for the plaintiff to demonstrate that the two witnesses were present for their depositions. Having failed to do so, it is not open to the respondent to argue that the witnesses were not actually present. The filing of an application within an hour of the order of closure of evidence is, in our view, suggestive of the fact that the witnesses were actually present. Absence of any affidavit by Vishnu Kumar Vyas and the proxy counsel would not, therefore, be a conclusive circumstance to show that they were not present on that date. 29

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The next question then is whether we ought to set aside the impugned judgment and decree and give yet another opportunity to the plaintiff as was prayed for by counsel appearing on his behalf. It is true that some opportunities were granted to the plaintiff even earlier to 24.02.2003 but the presence of the plaintiff and his witness Vishnu Kumar Vyas on 24.02.2003 could have prevented dismissal of the suit if their depositions were recorded. Since order dated 24.02.2003 closing the evidence of the plaintiff was in the peculiar circumstances of the case not justified in our opinion, another opportunity to the plaintiff to adduce all his evidence would meet the ends of justice subject to payment of cost.

We, accordingly, allow this appeal, set aside the impugned

judgment and decree and remand the suit back to the trial court with the direction that the plaintiffs shall file their own affidavits and the affidavits of their witnesses to be treated as examination-in-chief before the trial court within six weeks from today. The witnesses shall then be kept present for cross examination before the trial court on the date/dates of hearing which the trial court shall fix for that purpose. In case, affidavits are not filled within the time allowed or the witnesses are not kept present before the trial court on the date fixed for that purpose, the evidence of the said witnesses shall stand closed without any further opportunity to the plaintiff. This order is, however, subject to payment of Rs.7,000/- as costs to counsel opposite to be paid within four weeks from today. The parties are directed to appear before the District Judge for directions on 21.11.2006.

T.S. THAKUR, J

S.L.BHAYANA, J

NOVEMBER 07, 2006
sb/mc

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Forth CM 3703/07 w/p. 15/CPS (condonation of delay)